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Felony Murder--Question as to Continuance of Felony for Jury (People v. Walsh, 262 N.Y. 140 (1933))

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FELONY MURDER—QUESTION AS TO CONTINUANCE OF FELONY FOR JURY.—Two of the defendant's confederates were apprehended in the course of the robbery. The defendant, not being observed, attempted to escape through a side exit, which, however, was guarded. To effectuate his escape he shot the officer while in the exit. The judge refused to charge that the homicide must occur in the course of the felony and to charge the different degrees of homicide, but instructed the jury that if they believed the evidence, they should find the defendant guilty of felony murder and if they did not believe the evidence they should acquit. *Held*, when it is a question of fact as to whether the homicide occurred during the felony, it is error for the judge not to submit it to the jury and not to submit the lesser degrees when the jury might find there was no felony at the time. *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

A homicide committed in the course of a felony is considered murder in the first degree, regardless of intent or premeditation.¹ There are certain restrictions on this doctrine; the felony must be independent of the homicide so that there is no merger of the chief elements,² continuing and separately indictable.³ If the felony has not been attempted,⁴ or has been completed or abandoned⁵ the homicide requires proof of intent and deliberation to constitute murder in the first degree.⁶ Homicides occurring during arson, robbery, rape, burglary and larceny have been held not to merge.⁷ However, there still remains the element of continuance,⁸ which is difficult to limit. Where the felony occurs on property, the rule seems to be that it is a felony murder if the homicide has been committed on the premises,⁹ or while fleeing with the fruits of the crime, until the fugitive has reached apparent security.¹⁰ The Court in the present case remarked that while the presence on the premises may be important, as a means

¹ *Dolan v. People*, 64 N. Y. 485 (1876); *Buel v. People*, 78 N. Y. 492 (1879); *Cox v. People*, 80 N. Y. 500 (1880); *People v. Deacons*, 109 N. Y. 374, 16 N. E. 553 (1888); *People v. Wilson*, 145 N. Y. 628, 40 N. E. 392 (1895); *People v. Emieleta*, 238 N. Y. 158, 144 N. E. 487 (1924); *People v. Udwin*, 254 N. Y. 255, 172 N. E. 489 (1930); N. Y. PENAL LAW (1909) §1004, subd. 2.

² *Buel v. People*, *supra* note 1; *People v. Wagner*, 245 N. Y. 143, 156 N. E. 644 (1927); *People v. Moran*, 246 N. Y. 100, 163 N. E. 553 (1927).

³ *Dolan v. People*, *supra* note 1; *People v. Marwig*, 227 N. Y. 382, 125 N. E. 535 (1919); *People v. Moran*, *supra* note 2; *People v. Seiler*, 246 N. Y. 262, 158 N. E. 615 (1927).

⁴ *People v. Collins*, 234 N. Y. 355, 137 N. E. 753 (1922); *People v. Moran*, *supra* note 2.

⁵ *People v. Huter*, 184 N. Y. 237, 77 N. E. 7 (1906); *People v. Marwig*, *supra* note 3; *People v. Moran*, *supra* note 2.

⁶ *People v. Moran*, *supra* note 2.

⁷ *Buel v. People*, *supra* note 1.

⁸ *Supra* note 3.

⁹ *Dolan v. People*, *supra* note 1; *People v. Huter*, *supra* note 5.

¹⁰ *People v. Marwig*, *supra* note 3.

of determining whether the felony is going on at the time, it is not controlling, and since the jury from the evidence could find abandonment of the robbery it was error to charge they should find the defendant guilty if they believed the evidence.

C. T. S.

HOMICIDE—COMMON-LAW RULE, THAT DEATH OF VICTIM MUST OCCUR IN A YEAR AND A DAY, HAS BEEN ABROGATED.—An indictment for homicide against defendant was dismissed, the victim having died in a greater period of time than a year and a day. On appeal, *held reversed*, the indictment not being faulty; since the common-law rule that the victim must die in a year and a day has been abrogated. *People v. Legeri*, 239 App. Div. 47, 266 N. Y. Supp. 86 (2d Dept. 1933).

It is the rule of the old English common law that in order to sustain an indictment for homicide, the victim must have died within the period of a year and a day.¹ This is still the rule in many jurisdictions.² The principle has been held to be a rule of evidence³ and unless the victim died in the prescribed period, a prosecution for the homicide could not lie, since evidence would be inadmissible to show the injury was the cause of death.⁴ The law in such case presumes that death proceeded from some other cause than the wound.⁵

In the case of *State v. Dailey*,⁶ it has been held in support of the year-and-a-day rule, that the common law may be resorted to for definition of a crime not described in the statutes. This rule cannot apply in New York since express statutory provision abolishes common-law crimes and common-law punishments⁷ and expressly defines statutory crimes, persons capable of committing such, and punishment therefor.⁸ Thus, the common-law rule herein referred to cannot apply⁹ and an indictment for homicide need not be predicated on death of the victim in a period of a year and a day.¹⁰

V. G. R.

¹ 1 WHARTON, CRIMINAL LAW (11th ed. 1912) 629.

² *Roberts v. State*, 17 Ariz. 159, 149 Pac. 380 (1915); *Fisher v. State*, 109 Ark. 456, 160 S. W. 210 (1913); *Epps v. State*, 102 Ind. 539, 1 N. E. 451 (1885); *Rose v. Commonwealth*, 156 Ky. 817, 162 S. W. 107 (1914); *State v. Borders*, — Mo. —, 199 S. W. 180 (1917); *State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (1904); *State v. Williams*, 31 Nev. 360, 102 Pac. 974 (1909); *Percer v. State*, 118 Tenn. 765, 103 S. W. 780 (1907).

³ *People v. Murphy*, 39 Cal. 52 (1870).

⁴ *State v. Huff*, 11 Nev. 17 (1876).

⁵ *Ibid.*; *State v. Anderson*, 2 Nev. 729 (1868); *State v. Shepherd*, 30 N. C. 195 (1847); *State v. Orrell*, 12 N. C. 139 (1826).

⁶ 191 Ind. 678, 134 N. E. 481 (1922).

⁷ N. Y. PENAL LAW (1909) §22.

⁸ *Id.* §20.

⁹ N. Y. CONST. art. 1, §16.

¹⁰ Instant case.